

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHELLE BERTSCH,

Plaintiff,

vs.

DISCOVER FINANCIAL SERVICES, *et al.*,

Defendants.

Case No.: 2:18-cv-00290-GMN-EJY

ORDER

Pending before the Court are the Motions to Dismiss Plaintiff's Amended Complaint, (ECF Nos. 54, 56, 58, 59, 60), filed by Defendant Bank of America, N.A. ("BANA"); Defendant U.S. Bancorp ("Bancorp"); Defendant Chase Bank ("Chase"); Defendant Citibank, N.A. ("Citibank"); and Defendant Discover Financial Services ("Discover") (collectively "Defendants"). Plaintiff Michelle Bertsch ("Plaintiff") filed a Response, (ECF No. 62), to BANA's Motion to Dismiss, and two consolidated Responses, (ECF Nos. 64, 65), although Plaintiff fails to identify which Motions each consolidated Response is meant to address. BANA, Bancorp, Discover, Citibank, and Chase filed Replies, (ECF Nos. 63, 66, 70, 71, 73).

For the reasons discussed below, the Court **GRANTS** Defendants' Motions to Dismiss, (ECF Nos. 54, 56, 58, 59, 60).

I. BACKGROUND

This case arises from the alleged identity theft of Plaintiff. (First Am. Compl. ("FAC") at 3, ECF No. 53). Plaintiff states that she "properly notified Defendants that she was a victim of identity theft, and requested validation of the debts allegedly incurred." (*Id.*). Plaintiff further alleges that "Defendants refused to eliminate the debt despite the purchase of Identity Theft." (*Id.*). As a result of the alleged theft of Plaintiff's identity, Plaintiff states that she disputed "countless credit card transactions" with Defendants, who are all banking institutions.

1 (*Id.* at 1–3). For example, Plaintiff alleges that on November 2, 2017, she filed a “Qualified
2 Written Request Non Negotiable Dispute of Alleged Debt” with Defendants. (*Id.* at 3).
3 According to Plaintiff, that filing was to “no avail,” and “Defendants continued to litigate the
4 debts as valid debts.” (*Id.* at 3–4)

5 Plaintiff, acting *pro se*, filed a Complaint on February 15, 2018, alleging twenty-eight
6 causes of action. Defendants each moved to dismiss Plaintiff’s claims pursuant to Federal Rule
7 of Procedure 12(b)(6). (*See* Mots. Dismiss, ECF Nos. 11, 15, 20, 36, 41). On March 6, 2019,
8 the Court dismissed Plaintiff’s Complaint. (Order at 15–16, ECF No. 52). However, the Court
9 granted Plaintiff leave to amend certain causes of action. (*Id.* at 15).

10 On March 27, 2019, Plaintiff filed her Amended Complaint, (ECF No. 53), setting forth
11 the following cause of action: (1) violation of the Fair Credit Reporting Act (FCRA) against all
12 Defendants; (2) violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.
13 § 1692(e), (g), and (a) against all Defendants; (3) violation of state and federal consumer
14 protection laws against all Defendants; (4) breach of good faith and fair dealing against all
15 Defendants; (5) deceptive and unfair trade practices against all Defendants; (6) violation of
16 section 5(a) of the Federal Trade Commission Act (FTC Act) 15 U.S.C. § 45 against all
17 Defendants; (7) violation of Regulation Z of the Truth in Lending Act (TILA) against all
18 Defendants; and (8) violation of the Fair Credit Billing Act (FCBA). (FAC at 5–16, ECF No.
19 53). Plaintiff does not indicate whether she alleges eight cause of action against any particular
20 defendant. (*Id.* at 15–16).

21 Defendants each move to dismiss Plaintiff’s Amended Complaint, arguing that Plaintiff
22 improperly “lumped” Defendants together and failed to properly plead any causes of action.
23 (*See generally* Mots. Dismiss, ECF Nos. 54, 56, 58, 59, 60). Defendants thus argue for
24 dismissal of Plaintiff’s Amended Complaint under Federal Rule of Civil Procedure 12(b)(6).
25

1 **II. LEGAL STANDARD**

2 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
3 that fails to state a claim upon which relief can be granted. *See N. Star Int'l v. Ariz. Corp.*
4 *Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
5 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
6 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.
7 *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the
8 complaint is sufficient to state a claim, the Court will take all material allegations as true and
9 construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792
10 F.2d 896, 898 (9th Cir. 1986).

11 The Court, however, is not required to accept as true allegations that are merely
12 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
13 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
14 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
15 violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
16 *Twombly*, 550 U.S. at 555).

17 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)
18 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*
19 *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's
20 complaint contain only "a short and plain statement of the claim showing that the pleader is
21 entitled to relief." Fed. R. Civ. P. 8(a)(2). "Prolix, confusing complaints" should be dismissed
22 because "they impose unfair burdens on litigants and judges." *McHenry v. Renne*, 84 F.3d
23 1172, 1179 (9th Cir. 1996). Mindful of the fact that the Supreme Court has "instructed the
24 federal courts to liberally construe the 'inartful pleading' of pro se litigants," *Eldridge v. Block*,

1 832 F.2d 1132, 1137 (9th Cir. 1987), the Court will view Plaintiff’s pleadings with the
2 appropriate degree of leniency.

3 “Generally, a district court may not consider any material beyond the pleadings in ruling
4 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
5 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*
6 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
7 “documents whose contents are alleged in a complaint and whose authenticity no party
8 questions, but which are not physically attached to the pleading, may be considered in ruling on
9 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for
10 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule
11 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
12 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
13 materials outside of the pleadings, the motion to dismiss is converted into a motion for
14 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th
15 Cir. 2001).

16 If the court grants a motion to dismiss, it must then decide whether to grant leave to
17 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
18 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
19 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); *Foman*
20 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear
21 that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow*
22 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

23 **III. DISCUSSION**

24 Defendants argue that Plaintiff’s Amended Complaint improperly “lumps” Defendants
25 together and fails to include sufficient factual allegations for Defendants to receive fair notice

1 of the basis for her claims. (*See, e.g.*, Bancorp Mot. Dismiss (“MTD”) at 6, ECF No. 56);
2 (Discover MTD at 6, ECF No. 60). In response, Plaintiff argues that pleading rules under
3 Federal Rule of Civil Procedure 8(a) only require “a short precise statement. This [amended]
4 complaint contains just that and is sufficient enough to move forward.” (*See Consolidated*
5 *Resp.* at 1, 7, ECF No. 65).

6 Though Federal Rule of Civil Procedure 8(a) encourages brevity in a complaint through
7 “short” and “plain” statements for entitlement to relief, Rule 8(a) nonetheless requires enough
8 detail to state “who is being sued, for what relief, and on what theory . . . to guide discovery.”
9 *McHenry v. Renne*, 84 F.3d 1172, 1177–78 (9th Cir. 1996); *Ashcroft v. Iqbal*, 556 U.S. 662,
10 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In other words, a complaint
11 must allege enough factual content to permit the reasonable inference that a defendant is liable
12 for unlawful conduct. *Iqbal*, 556 U.S. 678. Broad allegations that merely present a formulaic
13 recitation of a cause of action are not enough. *See Ashcroft v. Iqbal*, 556 U.S. at 678 (citing
14 *Twombly*, 550 U.S. at 555).

15 Plaintiff’s Amended Complaint does not survive the applicable pleading standard
16 because it lacks factual allegations that could permit a reasonable inference of how Defendants
17 are liable for unlawful conduct. *Iqbal*, 556 U.S. at 679. Plaintiff provides a few statements
18 supporting her claims. (*See FAC* at 3–4, ECF No. 53). However, the remainder of Plaintiff’s
19 Amended Complaint adds nothing more to those statements, and instead consists of boilerplate
20 legal conclusions repeated throughout each claim. This “formulaic” recital of legal
21 conclusions, without any statements as to how a defendant engaged in unlawful conduct, is
22 insufficient to survive a motion to dismiss. *Iqbal*, 556 U.S. at 679; *see McHenry*, 84 F.3d at
23 1177–78. Moreover, Plaintiff’s Amended Complaint fails to differentiate between any of the
24 named Defendants. A plaintiff suing multiple defendants “must allege the basis of his claim
25 against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2)[.]” *Flores v. EMC*

1 *Mortg. Co.*, 997 F. Supp. 2d 1088, 1103 (E.D. Cal. 2014). However, nowhere does Plaintiff
2 identify any actions or omissions attributable to a particular Defendant. The deficiency of
3 Plaintiff's Amended Complaint is especially apparent when looking to each claim.

4 **A. Violation of the Fair Credit Reporting Act**

5 Plaintiff's first claim asserts a violation of the Fair Credit Reporting Act (FCRA), 15
6 U.S.C. § 1681 *et seq.* against all Defendants. Congress enacted the FCRA "to ensure fair and
7 accurate credit reporting, promote efficiency in the banking system and protect consumer
8 privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 53 (2007).

9 Section 1681s-2(a) imposes certain duties on those who furnish information to
10 consumer reporting agencies ("CRAs"), called "furnishers" in the statute, in order to encourage
11 accurate reporting. However, "[d]uties imposed on furnishers under [Section 1681s-2(a)] are
12 enforceable only by federal or state agencies." *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d
13 1147, 1154 (9th Cir. 2009).

14 Section 1681s-2(b) imposes certain duties on those who furnish information to CRAs
15 upon notice of a dispute. However, "[t]hese duties arise only after the furnisher receives notice
16 of dispute from a CRA; notice of a dispute received directly from the consumer does not trigger
17 furnishers' duties under subsection (b)." *Gorman*, 584 F.3d at 1154.

18 Here, Plaintiff does not allege that she disputed the reporting with any credit reporting
19 agency or that any of Defendants received notification of the dispute from a credit reporting
20 agency. Having failed to sufficiently allege that Defendants had proper notice under FCRA
21 such as to trigger its duty to investigate Plaintiff's claims, Plaintiff fails to state a private cause
22 of action under FCRA and her claim must be dismissed.

23 **B. Violation of the Fair Debt Collection Practices Act**

24 Plaintiff's second claim asserts violations of the Fair Debt Collection Practices Act
25 (FDCPA), 15 U.S.C. § 1692 *et seq.*, against all Defendants. The FDCPA makes it unlawful for

1 debt collectors to use abusive tactics while collecting debts for others. *Ramanathan v. Saxon*
2 *Mortg. Servs., Inc.*, No. 2:10-cv-02061-KJD, 2011 WL 6751373, at *6 (D. Nev. Dec. 21, 2011).
3 The FDCPA defines a debt collector as “any person . . . who regularly collects or attempts to
4 collect . . . debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6).
5 Here, Plaintiff’s Amended Complaint does not allege that any of Defendants took any action to
6 collect any debt owed to another or otherwise. Therefore, Plaintiff’s second cause of action
7 fails to state a claim and must be dismissed.

8 **C. Violation of State and Federal Consumer Protection Laws**

9 Plaintiff’s third claim for relief merely alleges “violation of state & federal consumer
10 protection laws.” (FAC at 7–9). Rule 8 “demands more than an unadorned, the-defendant-
11 unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. Because Plaintiff fails to provide
12 any legal or factual basis for this claim, Plaintiff’s third cause of action is dismissed.

13 **D. Breach of Good Faith and Fair Dealing**

14 Plaintiff’s fourth cause of action asserts a claim for breach of good faith and fair dealing
15 against all Defendants. Under Nevada law, “[e]very contract imposes upon each party a duty of
16 good faith and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe*
17 *Cty.*, 784 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To
18 establish a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff
19 must show that: (1) the plaintiff and defendant were parties to a contract; (2) the defendant
20 owed a duty of good faith and fair dealing to the plaintiff; (3) the defendant breached his duty
21 by performing in a manner unfaithful to the purpose of the contract; and (4) the plaintiff’s
22 justified expectations were denied. *Crow v. Home Loan Ctr.*, No. 3:11-cv-00259-LRH-VPC,
23 2011 WL 2214118, at * 2 (D. Nev. 2011). Here, Plaintiff’s Amended Complaint fails to
24 identify any specific contract that existed between Plaintiff and any of Defendants. As such,
25

1 Plaintiff fails to state a claim for breach of the implied covenant of good faith and fair dealing.
2 Plaintiff's fourth claim must be dismissed.

3 **E. Unfair and Deceptive Trade Practices**

4 Plaintiff's fifth claim for relief asserts a claim for violation of Nevada's Deceptive Trade
5 Practices Act ("DTPA") against all Defendants. NRS 41.600 provides, "[a]n action may be
6 brought by any person who is a victim of consumer fraud. As used in this section, 'consumer
7 fraud' means: . . . A deceptive trade practice as defined in NRS 598.0915 to NRS
8 598.0925: . . ." To establish a violation of the DPTA, the plaintiff must demonstrate that (1) an
9 act of consumer fraud by the defendant (2) caused (3) damages to the plaintiff. *Picus v. Wal-*
10 *Mart Stores, Inc.*, 256 F.R.D. 651, 657–58 (D. Nev. 2009) (noting Nevada Supreme Court has
11 not specified the elements of a DPTA claim and predicting how the court would rule). Here,
12 Plaintiff's Amended Complaint does not contain factual allegations showing that any
13 Defendants engaged in a "deceptive trade practice" as defined in NRS 598.0915 to NRS
14 598.0925. As such, Plaintiff's fifth cause of action must be dismissed.

15 **F. Violation of Section 5 of the Federal Trade Commission Act**

16 Plaintiff's sixth cause of action purports to state a claim under Section 5 of the Federal
17 Trade Commission Act (FTCA), 15 U.S.C. § 45, against all Defendants. However, this claim
18 "fails from the start, as there is no private cause of action for violations of the FTCA. *Sea-Land*
19 *Serv., Inc. v. Atl. Pac. Int'l, Inc.*, 61 F. Supp. 2d 1102, 1107 (D. Haw. 1999) (citing *Carlson v.*
20 *Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973); *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d
21 1184, 1187 (8th Cir. 1996); *Fulton v. Hecht*, 580 F.2d 1243, 1248 n.2 (5th Cir. 1978)); *see also*
22 *Givens v. Paramount Mortg.*, No. 2:09-cv-3269-JAM-KJM, 2010 WL 1854100, at *1 (E.D.
23 Cal. May 6, 2010) ("More importantly, 15 U.S.C. § 45(a) does not provide a private cause of
24 action for a failure to respond to a QWR."). Accordingly, Plaintiff's sixth cause of action fails
25 to state a claim upon which relief can be granted. Thus, this claim is dismissed with prejudice.

1 **G. Violation of Regulation Z of the Truth in Lending Act and the Fair Credit**
2 **Billing Act**

3 Plaintiff's seventh and eighth causes of action allege violations of Regulation Z of the
4 Truth in Lending Act (TILA) and the Fair Credit Billing Act (FCBA), respectively. Congress
5 enacted TILA to promote "economic stabilization" and consumers' "informed use of credit."
6 *See* 15 U.S.C. § 1601(a). TILA is implemented by Regulation Z, 12 C.F.R. § 1026(a), which
7 establishes, *inter alia*, disclosures that credit card issuers must make to consumers and
8 circumstances under which a payment may be credited as late. *See* 12 C.F.R. §§ 226.1–226.59;
9 *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 198 (2011). Moreover, under the FCBA, a
10 consumer may notify a creditor of billing errors by writing to the creditor within sixty days of
11 the creditor's first transmission of a statement with the errors. *See* 15 U.S.C. § 1666(a). The
12 regulations provide that written notice of a billing error must be "received by a creditor . . . no
13 later than 60 days after the creditor transmitted the first periodic statement that reflects the
14 alleged billing error." 12 C.F.R. § 226.13. The creditor's duties under the FCBA are triggered
15 only upon receipt of a notice complying with the requirements of 15 U.S.C. § 1666(a).¹

16 Here, Plaintiff's Amended Complaint fails to allege what disclosures, if any, Defendants
17 failed to make to Plaintiff; fails to allege that any of Defendants credited any payment from her
18 as late; and fails to allege that Plaintiff properly and timely disputed any inaccurate charge
19 under the terms of the FCBA. As such, Plaintiff's seventh and eight causes of action must be
20 dismissed.

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23
24 ¹ Both TILA and FCBA are governed by a one-year statute of limitations, which runs "from the date of the
25 occurrence of the violation[.]" 15 U.S.C. § 1640(e). Defendants argue that Plaintiff became aware of the alleged
identity theft in 2016, and therefore, Plaintiff's TILA and FCBA claims are time barred. (*See, e.g.*, BANA MTD
at 10, ECF No. 54); (Bancorp MTD at 11, ECF No. 56); (Discover MTD at 5–6, ECF No. 70). However,
Plaintiff's Amended Complaint does not contain an allegation that she learned of the identity theft in 2016.
Accordingly, the Court will not consider this argument at this time.

H. Leave to Amend

Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to “freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). “[I]n dismissing for failure to state a claim under Rule 12(b)(6), ‘a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.’” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)); *see also Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (“A pro se litigant must be given leave to amend his or her complaint, and some notice of its deficiencies, unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.”).

As explained above, Plaintiff’s sixth claim for relief comes under a statutory provision that does not create a private right of action. Because this claim is not viable as a matter of law, amendment would be futile; and the Court accordingly dismisses it without leave to amend. *Lopez*, 203 F.3d at 1127.

However, the Court finds that Plaintiff may be able to plead additional details and facts to support her first, second, third, fourth, fifth, seventh, and eighth claims against Defendants. First, these claims appear to arise under viable private rights of action, though Plaintiff’s amendment must include clearer references to statutory or regulatory provisions when applicable. Additionally, Plaintiff’s amendment must put Defendants on sufficient notice of the allegations against them. Moreover, Plaintiff filed numerous exhibits that allegedly provide evidence in support of her claims. (*See* ECF Nos. 64, 67–69). Those exhibits were not filed with the complaint, and the Court will not consider that evidence at this stage or opine on its merit. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001). Nevertheless, Plaintiff may be able to review those exhibits to discern factual allegations that she can plead to support her claims. The Court accordingly will grant Plaintiff leave to file an

1 amended complaint for those claims. Plaintiff shall file her second amended complaint within
2 twenty-one (21) days from the date of this Order. Failure to do so will result in dismissal with
3 prejudice.

4 **IV. CONCLUSION**

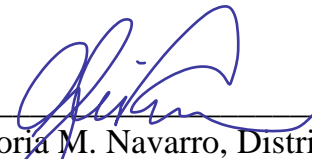
5 **IT IS HEREBY ORDERED** that Defendants' Motions to Dismiss, (ECF Nos. 54, 56,
6 58, 59, 60), are **GRANTED**.

7 **IT IS FURTHER ORDERED** that Plaintiff's first, second, third, fourth, fifth, seventh,
8 and eighth claims are **DISMISSED without prejudice**.

9 **IT IS FURTHER ORDERED** that Plaintiff's sixth claim is **DISMISSED with**
10 **prejudice**.

11 **IT IS FURTHER ORDERED** that Plaintiff shall have twenty-one (21) days from the
12 date of this Order to file a second amended complaint. Failure to file a second amended
13 complaint by this date shall result in the dismissal of Plaintiff's claims with prejudice.

14 **DATED** this 11 day of March, 2020.

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18 Gloria M. Navarro, District Judge
19 United States District Court
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